No. 276. 55

Brief of Palmer for P. E.

Supreme Court of the United States,

OCTOBER TERM, 1898.—No. 276.

Filed April 10, 1899

JOHN H. SCUDDER, Administrator of the Estate of JOHN F. HOUDAYER, Deceased,

Plaintiff in Error,

vs.

THE COMPTROLLER OF THE CITY AND COUNTY OF NEW YORK.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

Brief and Argument on Behalf of Plaintiff in Error.

J. CULBERT PALMER.
Of Counsel for Plaintiff in Error.

LIVINGSTON MIDDLETON CO., 63-67 GUARD ST., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1898. No. 276.

JOHN H. SCUDDER, as Administrator of the Estate of JOHN F. HOUDAYER, deceased, Plaintiff in Error, AGAINST The CONTROLLER OF THE CITY AND COUNTY OF NEW YORK.	In Error to the Surrogate's Court of the City and County of New York.

Brief and Argument for Plaintiff in Error.

Statement.

John F. Houdayer, a resident of the State of New Jersey, died within said State on or about the 21st day of May, 1895. Said decedent (as appears by the affidavit herein—Transcript of Record, fols. 13-16—which contains a statement of the facts upon which this case was submitted to the Appraiser) left no property whatever within the State of New York, unless a deposit in the Farmers' Loan and Trust Company of the City of New York, standing at the time of decedent's death in his name as Trustee under the last Will and Testament of Edmund Husson, deceased, and to a portion of which deposit it is admitted decedent was equitably entitled individually, can be regarded as such property.

Whether or no such deposit or such equitable right to a portion of such deposit is "property within the

State of New York," and subject to taxation under the provisions of Chapter 399 of the Laws of 1892, of the State of New York, entitled "An Act relating to taxable transfers of property" is the question at issue.

Such question was determined affirmatively by the Appraiser appointed in the transfer tax proceedings, and his report was confirmed by the Surrogate. The decision of the Surrogate was reversed by the Appellate Division of the Supreme Court, which decision was in turn reversed by the Court of Appeals of the State of New York and the decision of the Surrogate affirmed. To review such decision so affirmed a writ of error to this Court has been allowed.

The statute in question so far as it affects this case, is as follows:

"A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property in the following cases":

"§ 1. * * * * * *

"§ 2. When the transfer is by will or intestate law, of *property within the State*, and the decedent was a non-resident of the State at the time of his death."

* * * * * *

§ 22. "The words 'estate' and 'property' as used in this article shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this article and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees or vendees and shall include all property or interest therein whether situated within or without this State, *over which the State has any jurisdiction for the purpose of taxation.* The word 'transfer' as used in this article shall be taken to include the passing of property or any interest

therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed."

Specification of Errors.

The errors assigned in support of this Writ may be found at page 23 of the printed Record, and are as follows:

First.—That the property in question being situated in the State of New Jersey, of which State also the decedent was a resident at the time of his decease, the laws of the State of New York have no application thereto, nor have the Courts of New York jurisdiction thereof.

Second.—That by the law as interpreted by the decision and judgment herein, the Legislature of the State of New York attempts to exercise jurisdiction beyond the State and to affect contracts and rights of a citizen of another State which are protected by the Constitution and Laws of the United States and the judicial power granted to its Courts, and violates and interferes with the sovereignty of the State of New Jersey.

Third.—That the act of the Legislature of the State of New York herein referred to as applied to the facts and circumstances of this case or the act done under the authority of the State of New York here complained of is unconstitutional and void as being repugnant to Section 10 of Article I. of the Constitution of the United States, in that it impairs the obligation of the contract between a non-resident depositor and the Farmers' Loan & Trust Company of New York.

Fourth.—That the said Act of the Legislature as interpreted by the decision herein is repugnant to the fifth amendment of the Constitution of the United States, which provides that private property shall not be taken for a public use without just compensation.

FIFTH.—That the said Act of the Legislature as interpreted by the decision herein is repugnant to Sec. 1 of the 14th Amendment of the Constitution of the United States, by which States are forbidden to deprive citizens of life, liberty or property without due process of law.

POINTS.

First.

As to Jurisdiction.

The case is properly before this Court for review under Section 25 of the Judiciary Act of 1789. U. S. R. S., §709.

An analysis of the aforesaid Section of the Judiciary Act will show that there are three classes of cases which may be brought here thereunder. The case under examination is included in the *Second Class*, as the authority of the State of New York to impose a tax is questioned.

It is, however, only to cases included in the third class that the decisions in Oxley Stave Co. *v.* Butler County, 166 U. S., 650, and other similar cases, to the effect that the immunity claimed must appear upon the record to have been specially set up, are applicable.

As to the cases included in the second class, it is now fully established that it is not essential that the Federal question involved should be stated *in totidem verbis* in the Record. As to such cases, it is sufficient if the validity of a State Statute or an authority exercised under a State is drawn in question and the decision is in favor of its validity; and if the Federal question were necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of said question here.

Columbia Water Power Co. *v.* Co. Elec. S. R. L. & P. Co., U. S. Sup. Ct., Jan. 9, 1899.

It is respectfully submitted that the sole question herein is a Federal question—that nothing else was to be determined and that that must have been determined.

In the affidavit upon which the matter was originally submitted to the Appraiser, it is stated that the property in question was not "subject to taxation" (Transcript of Record, fol. 15). In the notice of appeal to the Surrogate from the decision of the Appraiser (Transcript of Record, fol. 20), it is stated that the ground for the appeal is that the "deposit in question was a chose in action belonging to a non-resident decedent, and not property within this State subject to taxation. * * * That the situs of the claim of decedent to such deposit was at the domicile of the decedent and not at the domicile of such depositary, and such property being the property of a non-resident decedent, and situated out of this State, the same does not fall within the purview of said Act."

Further, in the opinion of the Appellate Division reversing said Order of the Surrogate, it is stated (Transcript of Record, fol. 29) "Thus the Act is in harmony with the authorities which hold that the power of taxation of the State is limited to persons, property, and business within her jurisdiction (Foreign Bond Case, 15 Wall., 300). *This jurisdiction however is not what the State may choose to assert, but what, as a matter of fact it possesses;*" and after discussing the question of jurisdiction, the Court concludes (Transcript of Record, fols. 29–30) "Thus clearly this State has no jurisdiction for the purposes of taxation over the right of action here possessed by the decedent. It asserted no such jurisdiction in the Act in question, *nor could it have done so* * * * * *The State cannot create a liability in its own favor against the non-resident creditor by the mere exercise of jurisdiction over the resident debtor.*"

The opinion of the Court of Appeals refers to the opinion of the Appellate Division of the Supreme Court (Transcript of Record, fols. 50–51) in such a manner as to show conclusively that the same question was considered by the latter Court.

The record herein therefore clearly shows that the only substantial question raised and the only point

passed upon by the various Courts and finally decided adversely to the contention of the plaintiff in error was whether, under the given state of facts the Courts or the Legislature of the State of New York had any jurisdiction whatever. If the State of New York had jurisdiction it is conceded by the plaintiff in error that no writ will lie to this Court; but it is maintained that in order to arrive at a proper conclusion as to the jurisdiction of this Court, the question must first be determined upon its merits as the jurisdiction of the State of New York is involved.

The point which was actually determined by the Court of Appeals was that the situs of the chose in action in question was in the State of New York. This decision was equivalent to deciding that the State Court and the Legislature of the State had jurisdiction of the property taxed.

This question of jurisdiction was the one point involved in the whole proceeding; and the fact that a State Court in a proceeding of this character decides that it has jurisdiction of the person, property or business of a resident of another State, if, as a matter of fact, it has not jurisdiction, necessarily injuriously affects the rights of a citizen of such other State which are protected by the Constitution of the United States. This follows because taxation under such an authority is without "due process of law," and a violation of the 14th Amendment of the Constitution of the United States, since there can be no due process of law unless jurisdiction has been acquired.

As was said by Mr. Justice Field in the case of Gloucester Ferry Co. *v.* Penn., 114 U. S., at p. 208, quoting approvingly from the decision in the case of St. Louis *v.* The Ferry Co., 11 Wall., 423:

"When there is jurisdiction neither as to person nor property the imposition of a tax would be *ultra vires* and void. If the Legislature of a State should enact that the citizens of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in

any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit Constitutional inhibition. *Jurisdiction is as necessary to valid legislative as to valid judicial action.*"

See also Story Conflict of Laws, Sec. 20 and 32
Hares' Amer. Con. Law, p. 317.
McCullough *v.* Maryland, 4 Wheat., at p. 429.

But, it may be contended, granting that which has been said and assuming that a Federal question is involved, nevertheless the record does not show that that question was raised in the State Courts. The answer to that is that the question of jurisdiction over a citizen of another State or over property located in another State, for the purpose of taxation, was clearly raised. This necessarily involved a Federal question, because the imposition of a tax upon a citizen of another State in the absence of jurisdiction over his person, property or business, was clearly an interference with the sovereignty of such State and an impairment of the rights of a citizen thereof which are protected by the Constitution of the United States. That the State Courts so understood it is manifest by the opinions of said Courts which are a part of the record herein. From this point of view, the jurisdiction of this Court depends upon the interpretation of the language in the record hereinbefore quoted, and the case of *Dobbins* v. *The Commissioners of Erie County, 41 U. S., 435,* is directly in point and conclusive as to the propriety of this Court taking jurisdiction herein. The opinion of the Court delivered by Mr. Justice Wayne and embodying the facts of that case is as follows:

"This cause has been brought to this Court by a writ of error to the Supreme Court of Pennsylvania. That Court reversed the judgment of the Court of Common Pleas of Erie County which it had given in favor of the plaintiff (now in error) upon an agreed statement of facts in the nature of a special verdict."

It was agreed and admitted that the plaintiff has his residence and domicile at Erie. Erie County, Pa., and

votes in said place; that he has been for the last eight years an officer of the United States, a Captain of the United States Revenue Cutter Service, and ever since his appointment has been in active service in command of the Revenue Cutter *Erie*, on the Erie station. That he has been rated and assessed with county taxes for the last three years, 1835, 1836 and 1837, as such officer of the United States, for his office, as such, valued at five hundred dollars; which taxes paid by the plaintiff amount to the sum of $10.75. The question submitted to the Court is whether the plaintiff is liable to be rated and assessed for his office under the United States for county taxes and levies? If he is, then judgment shall be entered for the defendants; if not, then judgment shall be entered for the plaintiff for the sum of $10.75."

"This is the only question submitted upon the record. We think it sufficiently appears to give the Court jurisdiction that the Supreme Court in reversing the judgment of the Court of Common Pleas and in giving judgment against the plaintiff, decided in favor of the validity of a law of Pennsylvania, subjecting the plaintiff to be rated and assessed for his office under the United States for county rates and levies; the validity of which law was in question on the ground of its being repugnant to the Constitution and Laws of the United States."

In the case under examination the record as clearly shows that an authority exercised under a State is questioned upon similar grounds.

The case of Murray *v.* Charleston, 96 U. S., 432, is also directly in point and sustains the position of the plaintiff in error.

If jurisdiction is wanting it follows as a self-evident proposition (Foreign Held Bond Case, 15 Wall,. p. 320) that the taxing power cannot be legitimately exercised. If it is exercised upon a citizen of another State it must manifestly be in violation of the sovereignty of such other State and of rights of the citizen thereof which are guaranteed by the Constitution of the United

States, and must, in the case under examination, impair the obligation of the contract between the bank and its non-resident creditor (Cooley–Cons. Lim., 6th Ed., p. 597; Hares' Amer. Cons. Law, p. 319).

It follows that the record shows that there was drawn in question an authority exercised under a State on the ground of its being repugnant to the Constitution and laws of the United States.

SECOND.

On the Merits.

I.

Assuming that the case is properly before this Court, the single question to be determined is whether the interest of decedent in the deposit in question constituted property located within the State of New York.

That the interest of decedent in the deposit in question did not constitute property located within the State of New York, would seem to follow as a necessary corollary of the following propositions, which are well established:

(*a.*) The relation of a bank to its depositor is that of debtor and creditor.

Marine Bank *v.* Fulton Bank, 2 Wall., 252.
Bank of Republic *v.* Millard, 10 Wall., 152.
Phœnix Bank *v.* Risley, 111 U, S., 127.
United States *v.* Wardwell, 172 U. S., 55.

(*b.*) The situs of a debt for the purpose of taxation is

the domicile of the creditor and not that of the debtor.

No. Central R. R. Co. *v.* Jackson, 7 Wall., 262.
Cleveland P. & A. R. R. Co, *v.* Pa., 15 Wall., 300.
Murray *v.* Charleston, 96 U. S., 432.
Savings Society *v.* Multnomah Co., 169 U. S., 431.

The foregoing propositions are established by a long line of decisions of this Court, and it is not easy to see how the chose in action in question may be taxed by the State of New York without overturning the law of the United States, as it has been settled for many years.

The majority opinion of the Court of Appeals criticises the unanimous opinion of the Appellate Division of the Supreme Court because " it enables a large sum of money invested and left in the State of New York and enjoying the protection of its laws, to escape taxation therein," and as a reason for such taxation relies upon the fact that the act of the Legislature prescribed that all property or interest in property *within the State* susceptible of ownership should be subject to a transfer tax upon the death of its owner, whether he was a resident or non-resident.

Transcript of Record (fol. 51).

Any argument based upon the foregoing statement begs the question, as the contention is that the property *was not situated in the State of New York.* Moreover, the Court apparently ignores the fact that the deposit became the property of the bank ; that the protection extended was for the benefit of the bank, and not of the depositor, and that the bank was presumably taxed for the benefit of such protection. If the amount of the deposit had been lost or stolen the bank and not the depositor would have been the sufferer.

The prevailing opinion admits that the relation of

creditor and debtor existed (fol. 52) but states that the creditor could come and get his money when he wanted it, and that the deposit was subject to the attachment of creditors. It further states that in order to enforce his rights as creditor it was necessary for him to come into the State of New York (fol. 52). The Court seems to have misapprehended the situation in this respect, as the depositor obviously, upon the refusal of the Bank to pay the entire balance remaining on deposit without deduction of the amount of the tax, could have returned to the State of New Jersey and have there sued and recovered judgment for the amount of his claim and could have there collected the same, provided he could have there found property belonging to the debtor subject to attachment and execution. Moreover, he might have brought suit in the courts of the United States, where his rights would have been amply protected, and in no sense was he restricted to the courts of the State of New York for an enforcement of his rights.

Mr. Justice Barrett in the opinion of the Appellate Division of the Supreme Court clearly distinguishes the jurisdiction necessary to enforce the remedy of attachment from that necessary for the purposes of taxation, and any argument based upon a similarity between these powers is clearly erroneous. He says (Transcript of Record, fol. 30):

> "The debtor is not the debt, and jurisdiction over the debtor is not, for the purposes of taxation, jurisdiction over his obligation. There is jurisdiction to attach, but not to tax, the debt. The right to attach proceeds upon the jurisdiction over the resident debtor. There is jurisdiction to compel such debtor to pay what he owes his creditor to the latter's creditor. In that case the attachment does not create the obligation. It enforces it. The tax, however, creates the liability, and also enforces it. That can only be done when the person or the property of the creditor is with-

in the jurisdiction. The State cannot create a liability in its own favor against the non-resident creditor by the mere exercise of jurisdiction over the resident debtor. *It can enforce an existing liability, but it cannot create one.*"

Moreover, the very point here asserted, viz.: That a general deposit in a Bank constitutes a debt and is taxable only at the domcile of the creditor is clearly established in the case of San Francisco *v.* Mackey, 22 Fed. Rep., 603, where the Court says:

> " No particular number of coins can be set down as belonging to any depositor. The general depositary has a right to mingle the money with other moneys; use the surplus moneys deposited as his own and at his own discretion. The deposit is not special, it is simply an open money account. The depositor is only entitled to so much money in amount and to no particular money, which may or may not be paid when his cheque is presented according to the ability and will of the bank with which it is deposited. The depositor is in law only a creditor to the amount of the balance held by and due from the bank or banker on an open account. He could not replevy or recover possession of any particular money. The only way to enforce payment would be to bring a suit for any balance due as on any other open account for goods sold and delivered. It is but a chose in action. Under the authorities cited, independent of statutory provisions to the contrary, such credits have no situs for taxation against the creditor apart from the person of the depositor."

The cases relied upon by the Respondent as authority for the proposition that the property in question is taxable in the State of New York relate to *tangible* property, or at most to *intangible property represented by tangible securities within the State.* As to intan-

gible property such as the chose in action in question, the authorities are all in harmony that they are taxable only at the domicile of the owner.

II.

The transfer or inheritance tax acts of most of the various States of the Union which have adopted such system, are of comparatively recent origin, and the principles controlling the levy and collection of such taxes are different and in some cases conflicting. It should be the policy of the Courts to so construe the laws as to avoid, if possible, the objectionable result of double taxation. This result necessarily follows, in many cases in this country, from the Federal form of Government, and from the fact that many decedents leave *tangible* personal property in States other than that of their domicile. In such cases no doubt seems to exist as to the validity of a tax enforceable in both States. The result of double taxation, however, should not be unnecessarily extended, as it is obviously a hardship.

Similar tax laws have existed in England for more than a century, and the Courts of that country struggled for many years with the problems at present engaging the attention of our jurists. It is now established in England that the tax is payable if the English law governs the succession; otherwise the tax is not payable even if the property is located in England. It has been found that this conclusion aids materially the interests of justice and leads to satisfactory results.

Am. & Eng. En. of Law, Vol. 24, p. 454.

While it may be that the conflicting interests of the Sovereign States of the Union may prevent the adoption of a similar theory in this country, yet it should be the policy of this Court to aid substantial justice by preventing double taxation of citizens of the Union where it is possible so to do.

THIRD.

The order of the Court of Appeals reversing the order of the Appellate Division, should be reversed and the order of the Appellate Division reversing the order of the Surrogate confirming the order of the Appraiser should be affirmed.

J. CULBERT PALMER,
Of Counsel for Plaintiff in Error.